**U.S. Department of Labor**

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***January 28, 2000***

***CASE NUMBER: 1999-ERA-0020***

***In the Matter of:***

***LEE REID,***

***Complainant,***

***v.***

***SCIENTECH, INC.,***

***Respondent.***

Appearances:

Dean C. Brandstetter,
For the Complainant

Bradley J. Williams and Lee Radford,
For the Respondent

Before: Henry B. Lasky
Administrative Law Judge

## RECOMMENDED DECISION AND ORDER

This matter arises under the employee protection provisions of the Energy Reorganization Act of 1974, as amended in 1992 (ERA), 42 U.S.C. § 5851 *et seq*. Complainant Lee Reid was employed as a radiation protection supervisor for Scientech, Inc. (Scientech) from July 20, 1998, to October 1, 1998, at which time Complainant was terminated from his employment. On March 22, 1999, Complainant filed his complaint against Scientech alleging that his termination was retaliatory and unlawful under the ERA. In a letter dated May 19, 1999, the Department of Labor notified Scientech that the evidence supported the complaint that violations occurred and ordered specified remedies. Thereafter, Scientech requested a formal hearing on May 25, 1999. On June 10, 1999, the matter was assigned to the undersigned administrative law judge and a notice of hearing was issued. The hearing was ultimately conducted on December 7 and 8, 1999, in Rigby, Idaho. At the time of hearing. Complainant's Exhibits (hereinafter referred to as "CX") 1 through 6, 8 through 11,

and 13 through 32 were admitted. Respondent's Exhibits (hereinafter referred to as "RX") 1 through 23, 25, and 27 through 41 were also admitted at the hearing.

The matter was submitted subject to an order requiring the parties to file proposed findings of fact and conclusion of law on or before January 20, 2000, and the waiver by the parties of any time requirements to the contrary for the issuance of a recommended decision and order. Proposed Findings of Fact and Conclusions of Law were received from the parties within the time required, and based upon the evidence introduced at trial, the testimony of the witnesses, and having considered the arguments made in post-trial submissions of Complainant and Respondent, I make the following findings of fact, conclusions of law, and recommended decision and order.

## I. FINDINGS OF FACT

### A. Background

Scientech, Inc. is a corporation which conducts waste remediation and management for the Department of Energy. TR 206. In 1998, Versar, Inc. (Versar) was hired to clean up buildings located on Norton Air Force Base (Norton AFB), in San Bernardino, California. These buildings were used by the United States Air Force (USAF or Air Force) for several years as repair facilities for aircraft instrumentation. TR 31-32. While repairing the aircraft instrumentation, air force personnel used radioactive radium dye and paint to mark the instruments, which, over time, was spilled and splattered throughout the buildings. TR 31-32. Before the Air Force could turn Norton AFB over to San Bernardino County, the radioactive material had to be removed. TR 32-34. Scientech was a subcontractor of Versar, and was primarily responsible for characterizing the nature and extent of the radium contamination in the buildings. CX 25 (Work Plan, page 6 of 39). Any work performed by Scientech employees on the Norton AFB project had to comply with Nuclear Regulatory Commission rules. TR 101.

### B. Complainant's Evidence

#### 1. Testimony of Lee Reid

Complainant Lee Reid has been in the radiology industry for approximately 34 years. Transcript (hereinafter referred to as "TR") 88. He is qualified under the American National Standards Institute (ANSI), and has received a radiological control technician (RCT) certificate. TR 89-90; *see* CX 13 (providing Complainant's resume). On June 1, 1998, Complainant applied for a position with Scientech, and later received a job offer. TR 90-91. Complainant was hired to work for Scientech on a project located at Nellis Air Force Base (Nellis AFB) in Las Vegas, Nevada. TR 90-91. While working on the Nellis AFB project, Jeff Bradford, a Scientech manager, asked Complainant to participate in another project at Norton AFB in San Bernardino, California. TR 92-93. Complainant began working at Norton AFB on July 20, 1998, and believed that the job would end in February 1999. TR 93-94.

Before Complainant arrived at Norton AFB, he reviewed a work plan given to him by Scientech. TR 96. According to the plan, Complainant had the power to stop any work activities that were unsafe or

dangerous. TR 96; CX 25 (Health & Safety Plan, page 2 of 31). The plan further instructed employees to report conditions or situations that were unsafe to the Versar Project Manager (Mark Stockwell) or the Site Manager. CX 25 (Health & Safety Plan, page 2 of 31). Based on the information provided in the work plan, Complainant believed that he was required to report any problems to Mark Stockwell, and not his immediate supervisor, Steve Lopez. TR 96-97.

On September 30, 1998, Complainant testified that Mark Stockwell, the Versar Project Manager, asked him to find out why Mr. Lopez needed to borrow a chisel and hammer. TR 119. A few minutes later, Scientech employee Mark Sassar approached Complainant with samples which Mr. Sassar said had been taken by Mr. Lopez. TR 119. Complainant learned that the samples had been taken from storage drums located in the vestibule area of one of the buildings being surveyed by Scientech. TR 119-120. In addition, Mr. Sassar informed Complainant that Mr. Lopez had not worn the appropriate personal protection gear that was required before a sampling could be taken. TR 130-131. Complainant testified that there were several signs posted in the vestibule area which alerted a person that an RWP (radioactive work permit) was required before entry. TR 120-121; *see* CX 24 (providing a copy of the posting). An RWP establishes the level of training that the worker must have acquired before he or she is allowed to enter the area. TR 121. Complainant testified that Mr. Lopez was not allowed to enter the area because he did not have the required training and was not authorized in the RWP. TR 119, 125-126; *see* CX 26 (providing a copy of the RWP for the vestibule area). Thus, Complainant asserts that Mr. Lopez violated federal regulations, such as 10 C.F.R. 20.[1] TR 119.

After learning this information, Complainant testified that he spoke with Mark Stockwell on September 30, 1999, regarding his concerns that Mr. Lopez had violated the federal regulations. TR 131-132. Complainant alerted Mr. Stockwell because he believed that the work plan directed him to do so. TR 131-132. Complainant also recorded Mr. Lopez's violation on a page in the daily project log; however, Complainant testified that this page is now missing from the daily log. TR 132-133.

Complainant testified that on October 1, 1998, at the daily safety meeting, he discussed his concern that Mr. Lopez had violated the federal regulations when he took the samples from the drums. TR 135. After Complainant raised his concerns, he testified that Mr. Lopez "got frantic, and immediately said, 'You and I need to go outside.'" TR 135. During their conversation, Complainant testified that Mr. Lopez threatened to terminate him if he said anything more to the Air Force or Versar management. TR 136. Complainant assured Mr. Lopez that he did not speak with the Air Force, only Versar. TR 136. Mr. Lopez informed Complainant that he would be speaking with Jeff Bradford, a manager for Scientech. TR 136-137. After the conversation, Complainant testified that he went to work with James Keating.

A few hours later, Mr. Lopez approached Complainant to discuss his sampling of the drums. TR 138. After Mr. Lopez explained his reasons for taking the samples, Complainant testified that he again informed Mr. Lopez that the regulations had been violated when Mr. Lopez took the samples. TR 138. Complainant stated that he left the building where the conversation was taking place and walked outside. TR 138. Mr. Lopez

[1] *See* 10 C.F.R. § 20.1001(a) (stating that these federal regulations were established to provide "standards for protection against ionizing radiation resulting from activities conducted under licenses issued by the Nuclear Regulatory Commission").

followed Complainant outside and informed him that "Mr. Bradford will be down Monday and he'll take care of you and this problem." TR 139. Complainant then asked Mr. Lopez what he meant by his statement and asked whether Mr. Bradford was going to fire him. TR 139. When Mr. Lopez did not respond to him, Complainant testified that he said, "Steve, is Mr. Bradford going to come down and fire me? Why don't you do it? . . . Why wait until Monday? Why don't you just do it if you feel it's right?" TR 139. Mr. Lopez responded, "You're fired. Give me your keys and get off the site." TR 139. Complainant admitted that he raised his voice, but explained that Mr. Lopez had also raised his voice during this discussion. TR 139.

On direct examination, Complainant also denied that he was given verbal or written warnings by Mr. Lopez during the course of his employment. TR 105-111. In fact, Complainant asserted that he was not yet working at Norton AFB when one of the alleged warnings was given. TR 106. Furthermore, Complainant testified that Mr. Lopez was not on the site when other alleged warnings were given to Complainant by Mr. Lopez. TR 107-110. Complainant also denied that he and Mr. Lopez ever had an argument over the use of a work truck. 112. In addition, Complainant testified that he and Mr. Lopez did not argue over the surveying of the upstairs portion of a building, or about the sampling of a room. TR 111-112, 114-117.

On cross examination, Complainant admitted that he had a confrontation with Mr. Lopez regarding the training when he arrived at Norton AFB. TR 157. Complainant also admitted that he did not approach Frank Bordell, a senior health physicist hired by Scientech to conduct a general audit of the corporation's operations at Norton AFB, regarding his safety concerns. TR 174-177. In addition, Complainant admitted that he did not personally see Mr. Lopez conduct sampling of the drums and that he did not talk with Mr. Lopez about the sampling prior to the daily safety meeting because he was worried about a potential confrontation. TR 189-190. Complainant further admitted that he said, "Why don't you fire me?" twice during his conversation with Mr. Lopez. TR 198.

During his rebuttal testimony, Complainant explained that he did not "blow-up" at Mr. Lopez regarding the training issue, and that he did not get in the face of Mr. Lopez during their discussion after the safety meeting on October 1, 1998. TR 337-338. He also testified that Mr. Lopez shouted at him and that he was intimidated by Mr. Lopez's outburst. TR 338. In addition, Complainant testified that even assuming that Mr. Lopez had been trained as a rad worker I or II, he would still not have been authorized under the Nuclear Regulatory Commission regulations to conduct the sampling. TR 340.

### 2. Testimony of James Keating

Complainant also presented the testimony of James Keating at the hearing. Mr. Keating worked on the Norton AFB project as a radiation protection supervisor under the supervision of Complainant. TR 30. According to Mr. Keating, Mr. Lopez told him on October 1, 1998, that Complainant had been fired. TR 65. Mr. Lopez explained to Mr. Keating that he and Complainant had discussed a sampling Mr. Lopez had taken, and that he did not like Complainant breaking the chain of command by going to Versar with his concerns. TR 66-67.

On cross-examination, Mr. Keating testified that he wrote a letter of recommendation for Complainant, in which he stated that Complainant was "technically competent, professional, and [a] hard working

individual." TR 71. In addition, the letter stated that Mr. Keating had never seen Complainant raise his voice or become belligerent. TR 72. When questioned about Complainant's firing, Mr. Keating testified that Mr. Lopez did not tell him that Complainant had said, "If you want to fire me, go ahead and fire me." TR 80.

### 3. Deposition Testimony of Lea Reed

At the hearing, Complainant presented the telephonic deposition testimony of Lea Reed. CX 31. Ms. Reed worked for Scientech on the Norton AFB project. Deposition of Lea Reed, presented as Complainant's Exhibit 31 (hereinafter referred to as "Lea Reed Depo"), at 5-6. Her immediate supervisor at Norton AFB was Complainant. Ms. Reed testified that she never saw Complainant act belligerent or abusive towards Mr. Lopez. Lea Reed Depo 10. Ms. Reed also explained that she had never seen Complainant become confrontational with Mr. Lopez, with the exception of the argument which occurred on the day that Complainant was fired. Lea Reed Depo 10.

Ms. Reed testified that she was present on October 1, 1998 when the dispute regarding the sampling of the barrels occurred between Complainant and Mr. Lopez. Lea Reed Depo 11. Ms. Reed overheard Complainant telling Mr. Lopez that he was concerned about the samples being taken incorrectly and that Mr. Lopez was not necessarily qualified to take the samples. Lea Reed Depo 13. Furthermore, Ms. Reed testified that she heard Complainant say to Mr. Lopez, "[W]hy don't you fire me then." Lea Reed Depo 15. On cross-examination, however, Ms. Reed admitted that she did not know how many times Complainant said, "Why don't you fire me." Lea Reed Depo 25-26. During the deposition, Ms. Reed did not have an opinion as to whether Complainant had been insubordinate; she believed that Complainant was genuinely upset over the safety violations and that he voiced those concerns. Lea Reed Depo 19. After the argument, Ms. Reed testified that Mr. Lopez requested that she assist him in sampling the barrels, and that Mr. Lopez did not wear personal protective equipment during the sampling. Lea Reed Depo 15-16.

### 4. Deposition Testimony of Mark Sassar

Complainant also presented the telephonic deposition testimony of Mark Sassar at the hearing. CX 32. Mr. Sassar worked for Scientech on the Norton AFB projects as a radiation detection supervisor. Deposition of Mark Sassar, presented as Complainant's Exhibit 32 (hereinafter referred to as "Sassar Depo"), at 5-6. His direct supervisor on the Norton AFB project was Complainant. Sassar Depo 7. Mr. Sassar testified that he never saw Complainant yell or scream at Mr. Lopez; however, he did state that Complainant and Mr. Lopez had a heated discussion regarding training. Sassar Depo 9-10. In addition, Mr. Sassar testified that Complainant is "the quietest, calmest person" he'd ever met. Sassar Depo 12. Mr. Sassar further stated that he could not characterize Complainant's behavior towards Mr. Lopez as insubordinate. Sassar Depo 13. In fact, when Complainant would raise quality and safety concerns, Mr. Sassar explained that Mr. Lopez would chastise Complainant and instruct Complainant to get to work. Sassar Depo 13.

During his deposition, Mr. Sassar testified that he saw Mr. Lopez taking samples from the drums, and that he told Mr. Lopez that he should not be taking the samples. Sassar Depo 17. Mr. Sassar explained that he then informed Complainant that Mr. Lopez was taking the samples. Sassar Depo 17. According to Mr. Sassar, Mr. Lopez was not qualified to be taking the samples. Sassar Depo 19. Mr. Sassar also testified that

Mr. Lopez's general response to safety-related concerns was to say, "I'm the boss, do what I say or else." Sassar Depo 24. When Mr. Sassar raised safety concerns to Mr. Lopez, he believed that Mr. Lopez was not receptive to his concerns. Sassar Depo 25. In addition, Mr. Sassar stated that he had seen Mr. Lopez become abusive with other employees. Sassar Depo 27.

### C. Respondent's Evidence

#### 1. Testimony of Steven Lopez

At the hearing, Respondent presented the testimony of Steven Lopez. Mr. Lopez worked for Scientech as a program manager/senior scientist on the Norton AFB project. TR 206-207. Mr. Lopez has a Bachelor's degree in biochemistry and a Master's degree in environmental biology, and is currently pursuing his doctorate in waste management. TR 205. Mr. Lopez is no longer an employee of Scientech, Inc.

At the hearing, Mr. Lopez testified that shortly after arriving at Norton AFB, Complainant discussed the need for immediate training and was angered by Mr. Lopez's decision that they were going to adhere to an amended training schedule. TR 218-219. Mr. Lopez stated that Complainant began yelling at Versar management employees. TR 219. Mr. Lopez testified that he told Complainant that it was not appropriate to raise his voice at Scientech's customer (Versar). TR 119-120. According to Mr. Lopez, Complainant then became angry and said, "Well, go ahead and fire me. Go ahead and fire me." TR 220. On another occasion, Mr. Lopez testified that he instructed Complainant not to enter a specific room because Versar had given instructions that no one was to enter the room without its approval. TR 226. When Mr. Lopez discovered that Complainant was in the room, he testified that Complainant just "blew up" at him. TR 227. Complainant then said to Mr. Lopez, "You hired us, let us do our job. We know what we're doing. Let us do our job." TR 227.

Mr. Lopez testified that he believed that Complainant was a good worker, and that "he was literally the first person there, [and] the last one to leave." TR 228. In fact, Mr. Lopez stated that Complainant was valuable to Scientech, despite their personality conflicts. TR 228. Furthermore, Mr. Lopez explained that he had given Complainant the responsibilities of conducting safety meetings and recording daily journals. TR 228-229.

On September 30, 1998, Mr. Lopez testified that after putting on his personal protection equipment (booties, Tyvek gloves, and a respirator), he took samples of the contents of barrels located in the vestibule area. TR 234-235. Mr Lopez testified that he was not made aware of any problems with the sampling until October 1, 1998, when Mr. Stockwell informed him that Complainant had a problem with the way Mr. Lopez did the sampling. TR 236. In addition, Mr. Stockwell stated that he was uncomfortable with Complainant approaching him about safety concerns, instead of approaching Scientech. TR 236. After his discussion with Mr. Stockwell, Mr. Lopez telephoned his supervisor, Mr. Bradford, regarding Complainant's discussion with Scientech's customer (Versar). TR 237. According to Mr. Lopez, he told Mr. Bradford that he would sit down with Complainant and explain the reasons for the sampling. TR 240. In addition, Mr. Bradford told Mr. Lopez to have Complainant call Mr. Bradford later that day regarding the sampling.

Later that morning, Mr. Lopez testified that he spoke with Complainant about the sampling. TR 241. Mr. Lopez stated that Complainant said that his explanation for the sampling was fine. TR 241. Mr. Lopez also testified that it was during this conversation that Complainant raised his concerns that Mr. Lopez had not worn personal protection equipment during the sampling and that violations of federal regulations had occurred. TR 241. At the end of the conversation, Mr. Lopez informed Complainant that Mr. Bradford wanted to speak with Complainant. TR 241. According to Mr. Lopez, Complainant asked why Mr. Bradford wanted to speak with him. TR 241. Mr. Lopez testified that he stated that Versar was unhappy about him approaching Versar instead of Scientech regarding the sampling. TR 242. Mr. Lopez testified that Complainant then "got ticked off," and started yelling at Mr. Lopez, "You think you're the manager. You fire me. You fire me. Come on, fire me. Go ahead." TR 242. Mr. Lopez then told Complainant that no one wanted to fire him. TR 242. However, according to Mr. Lopez, Complainant repeated fifteen or twenty times, in a loud voice, "Fire me. Come on. Fire me." TR 242. Mr. Lopez testified that he tried backing away from Complainant, but then said, "Fine, you're fired." TR 242-243.

On cross-examination, Mr. Lopez admitted that there were inconsistencies regarding the dates that he allegedly gave Complainant warnings regarding his behavior. TR 246-247. Mr. Lopez further asserted on cross-examination that it was improper for Complainant to speak with Versar regarding his concerns even though the work plan instructed Complainant to do so. TR 254. Mr. Lopez also admitted that he is not ANSI, nor RCT qualified.

**2. Testimony of Jeff Bradford**

Respondent also presented the testimony of Jeff Bradford at the hearing. Mr. Bradford was a Scientech employee on the Norton AFB project. TR 281. While working on the Norton AFB project, Mr. Bradford reported to Michael Gauss, and Mr. Lopez reported to Mr. Bradford. TR 282. According to Mr. Bradford, Scientech never had any intent to terminate Complainant's employment. TR 290-291. Mr. Bradford testified that after Mr. Lopez told him that Complainant had approached Versar regarding a sampling event, he explained to Mr. Lopez that such matters needed to be resolved internally and requested that Complainant call him regarding these concerns. TR 291-92. Later that same day, Mr. Bradford testified that he received a phone call from Mr. Lopez informing him that Complainant had been terminated. TR 294. Mr. Lopez told Mr. Bradford that Complainant had blown-up at him, and began yelling, "Fire me, fire me, fire me, fire me, fire me. . . ." TR 294. Mr. Bradford testified that Mr. Lopez never mentioned that they had argued over safety issues, and that he believed that Complainant was fired because he had yelled at Mr. Lopez. TR 294.

On cross-examination, Mr. Bradford admitted that Mr. Lopez did not advise him of the sampling activities. TR 297. In addition, Mr. Bradford admitted that he told Mr. Lopez that matters needed to be resolved internally, and that if employees did not agree, they could find work elsewhere. TR 299. Most importantly, Mr. Bradford admitted that if Complainant raised a safety related concern, he was obligated, pursuant to the work plan, to report that concern to Mr. Stockwell. TR 301.

### 3. Testimony of Michael Gauss

At the hearing, Respondent also presented the testimony of Michael Gauss. Mr. Gauss was a manager for Scientech during the Norton AFB project. TR 309. Mr. Gauss explained the termination process used by Scientech; however, he testified that the process can be bypassed where a supervisor is threatened. TR 311-312. Mr. Gauss explained that there was no intent to fire Complainant as of October 1, 1998. TR 314-315. According to Mr. Gauss, Complainant was fired because of his conduct, belligerence, and his threats to Mr. Lopez. TR 316.

On cross-examination, Mr. Gauss admitted that Scientech's first official response to Complainant's firing was that Complainant, "by acting outside the normal and accepted chain of protocol, . . . put the company's customer Versar in an uncomfortable position and therefore adversely affected company/client relationships." TR 320.

### 4. Deposition Testimony of Mark Stockwell

At the hearing, Respondent presented the telephonic deposition testimony of Mark Stockwell. RX 40. Mr. Stockwell was the site manager for Versar on the Norton AFB project. Deposition of Mark Stockwell, presented as Respondent's Exhibit 40 (hereinafter referred to as "Stockwell Depo"), at 5-6. Mr Stockwell testified that he believed Complainant had a communication problem, and would raise his voice to get his point across. Stockwell Depo 12. In addition, Mr. Stockwell noted that Mr. Lopez also had a problem communicating, and was perceived by his staff as being "a bit" belligerent as well. Stockwell Depo 12-13. Mr. Stockwell also testified that while he could not characterize Complainant's behavior as being insubordinate, he would consider the verbal tactics used by Complainant inappropriate. Stockwell Depo 13.

During his deposition, Mr. Stockwell explained that Complainant brought safety concerns regarding the sampling of the drums to his attention. Stockwell Depo 15-16. According to Mr. Stockwell, Complainant believed that the drums were being sampled inappropriately and that Mr. Lopez had not used personal protection equipment. Stockwell Depo 16. While testifying, Mr. Stockwell recalled the safety meeting where Complainant raised his safety concerns regarding the sampling, and stated that in his opinion, Complainant had "blind-sided Mr. Lopez." Stockwell Depo 20. After the meeting, Mr. Stockwell testified that he heard the raised voices of both Complainant and Mr. Lopez. Stockwell Depo 22. Mr. Stockwell further noted that he believed that Complainant had a problem with Mr. Lopez from the very beginning of the project. Stockwell Depo 32.

### 5. Deposition Testimony of Wes Hoover

Respondent also presented the telephonic deposition of Wes Hoover at the hearing. RX 41. Mr. Hoover was a construction supervisor for Scientech on the Norton AFB project, and reported to Mr. Lopez. Deposition of Wes Hoover, presented as Respondent's Exhibit 41 (hereinafter referred to as "Hoover Depo"), at 9. Mr. Hoover testified that Mr. Lopez appeared to respect Complainant's opinions, and would try to find a way to address or resolve Complainant's concerns. Hoover Depo 12. Mr. Hoover also stated that

Complainant was a good and hard worker, and that he considered Complainant to be an asset in completing the Norton AFB project. Hoover Depo 13-14.

### D. Unemployment Eligibility Determination & Hearing

After Scientech terminated Complainant's employment at Norton AFB on October 1, 1998, Complainant sought unemployment benefits through the state of Idaho. Complainant was interviewed on October 23, 1998, by a state employee, and signed a statement indicating that he was concerned about safety and that he did not become belligerent. RX 33:2. Complainant admitted in the statement that he had approached Versar regarding the safety concerns and noted the fact that Mr. Lopez had not followed procedure. RX 33:1. It was determined that Complainant was discharged for misconduct in connection with his employment with Scientech and thus found Complainant ineligible for unemployment benefits effective October 4, 1998. RX 32:1.

On December 3, 1998, Joyce M. Martin of the Idaho Department of Labor Appeals Bureau held a hearing in Boise, Idaho. RX 37:1-3. The hearing was conducted via telephone, and Complainant, Steve Lopez, and Michael Gauss each testified. RX 37:1-3. On December 9, 1998, the Appeals Examiner concluded that Complainant was discharged for misconduct in connection with employment, and thus, ineligible for benefits. RX 38:5. Complainant appealed the Appeals Examiner's decision to the Industrial Commission of the State of Idaho, which affirmed the prior decision. RX 21:10. Complainant is currently pursuing an appeal of the Industrial Commission's decision to the Idaho Supreme Court. *See* RX 35 (providing a copy of the *pro se* brief Complainant filed with the Idaho Supreme Court).

## II. CONCLUSIONS OF LAW

### A. Collateral Estoppel

The first issue that must be addressed is whether Complainant's action under the ERA is barred under the doctrine of collateral estoppel because the State of Idaho has previously determined that Complainant was terminated because of his misconduct. In its pre-trial statement, Respondent suggested that this Idaho determination precluded Complainant from relitigating the issue of his termination in his federal whistleblower action. Resp. Pre-Trial Statement at 34. At the hearing, the undersigned questioned the parties at length regarding the applicability of collateral estoppel in this case, and requested the parties to address this issue in their post-hearing briefs. TR 21-24, 342-344.

In their post-hearing briefs, it appears that both Complainant and Respondent have agreed that the Idaho determination does not have any preclusive effect on Complainant's federal whistleblower action. Complainant's Proposed Findings at 15-16; Resp. Proposed Findings at 16. Idaho law states that "[n]o finding of fact or conclusion of law in a decision or determination rendered . . . by an appeals examiner [or] the Industrial Commission . . . shall have preclusive effect in any other action or proceeding. . . ." IDAHO CODE § 72-1368 (1999). Consequently, the Idaho Industrial Commission's decision affirming the denial of unemployment benefits to Complainant because he was insubordinate has no preclusive effect in Complainant's federal whistleblower action.

Even though the Idaho decision does not have preclusive effect, Respondent argues that the findings of the Idaho Industrial Commission constitute persuasive authority, citing Abraham v. Lawnwood Regional Medical Center, 96-ERA-13 (ARB Nov. 25, 1997). Resp. Proposed Findings at 16. Respondent's reliance on Abraham, however, is misplaced. Contrary to Respondent's contention, however, the Administrative Review Board (ARB) did not "clearly rel[y] upon the persuasive value of the findings of the state agency." Resp. Proposed Findings at 16. The ARB mentioned, in a footnote, that the complainant's discharge in that case was merely viewed as a matter of management discretion and prerogative by the state unemployment agency; the ARB did not base its decision that the complainant was not entitled to federal whistleblower protection on this particular determination by a state agency.

Furthermore, the undersigned finds that the Idaho decision does not constitute persuasive authority given the inadequacies of the hearing before the Idaho Department of Labor's Appeals Bureau upon which the Industrial Commission based its opinion. First, Complainant was not represented by counsel at the hearing, which substantially affected his ability to present his case. While the undersigned recognizes that a claimant is not required to have representation at the hearing, and that the State of Idaho is not required to provide a claimant with representation, the Supreme Court has held that "[c]ounsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient." Goldberg v. Kelly, 397 U.S. 254, 270 (1970). Second, the appeals examiner did not explore all of the relevant facts in the case. The courts have recognized the duty of a court to "scrupulously and conscientiously probe into, inquire of, and explore for all relevant facts," especially where the claimant is unrepresented by counsel. Thompson v. Sullivan, 933 F.2d 581, 585 (7th Cir. 1991) (quoting Smith v. Secretary of Health, Education & Welfare, 587 F.2d 857, 860 (7th Cir. 1978)). At the hearing, the appeals examiner often prevented Complainant from asking several important questions during his cross-examination of the witnesses, and prevented him from answering questions during his own direct examination, thus precluding a full record from being developed.[2] Third, the hearing was conducted via telephone, which prevented the appeals examiner from assessing the credibility of the witnesses testifying at the hearing. The courts have stated that "[t]here can be no doubt that seeing a witness testify live assists the finder of fact in evaluating the witness's credibility," United States v. Mejia, 69 F.3d 309, 315 (1995), because the fact finder "can be made aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." Anderson v. City of Bessemer, 470 U.S. 564, 575 (1985). Consequently, the undersigned finds that the decision of the Idaho Industrial Commission does not constitute persuasive authority in the present case based on the above-described inadequacies of the hearing before the appeals examiner.

In addition, the decision of the Idaho Industrial Commission is not persuasive authority because Complainant is currently appealing its decision. Under Idaho law, until a decision is rendered regarding a

[2] *See* Transcript of Hearing Before the Idaho Department of Labor Appeals Bureau (presented as RX 37 and CX 4) at 20, 22, 23-24, 34, 35, 37, and 52 (providing examples of the appeals examiner intervention in Complainant's attempt to cross-examine witnesses at the hearing).

claimant's appeal from the Idaho Supreme Court, the decision of the Industrial Commission is not final.[3] IDAHO CODE § 72-1368(11)(a). As a result, it would be improper for the undersigned to utilize the Industrial Commission's decision as persuasive authority.

For the above described reasons, the undersigned finds that collateral estoppel does not apply in the present case, and that the Idaho Industrial Commission's decision is not persuasive authority in Complainant's federal whistleblower action.

### B. Complainant's Claim of Whistleblower Protection Under the ERA

Because collateral estoppel does not bar Complainant's action, it is now necessary to evaluate Complainant's claim of whistleblower protection under the ERA. Once a case has been fully tried on the merits, it is no longer necessary for the administrative law judge to determine whether a complainant has presented a *prima facie* case. Eltzroth v. Amersham Medi-Physics, Inc., ARB No. 98-002, ALJ No. 1997-ERA-31 (ARB Apr. 15, 1999). The Administrative Review Board (ARB) has held that once the employer has produced evidence in an attempt to show that the complainant was subjected to adverse action, such as termination, for a legitimate, nondiscriminatory reason, it no longer serves any analytical purpose to answer the question whether the complainant presented a *prima facie* case. *Id.* Instead, the relevant inquiry is whether the complainant prevailed by a preponderance of the evidence on the ultimate question of liability. *Id.* Therefore, the administrative law judge must determine whether the complainant has proven, by a preponderance of the evidence, that the Complainant engaged in protected activity under the ERA, that the employer took adverse action against the complainant, and that the complainant's ERA protected activity was a contributing factor in the adverse action that was taken. Paynes v. Gulf States Utilities Co., ARB No. 98-045, ALJ No. 1993-ERA-47 (ARB Aug. 31, 1999); Eltzroth, *supra.*

In the present case, Respondent produced evidence at trial in an attempt to prove that Complainant was fired for two reasons. First, Respondent asserts that Complainant was fired because he was insubordinate. Respondent submitted the testimony of Mr. Lopez, who testified that Complainant had yelled at him over training issues, disobeyed instructions to stay out of a particular area on the base, and became angry with Mr. Lopez when they spoke about the sampling incident. Furthermore, Mr. Lopez believed that Complainant disobeyed instructions that Scientech employees should direct all complainants and concerns to Mr. Lopez, rather than following the procedures in the work plan. Respondent also submitted the testimony of Mike Gauss, who testified that he believed Complainant was fired because he was insubordinate, belligerent and threatening. Second, Respondent contends that Complainant was fired only after he requested that he be fired. Respondent

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[3] "Any right, fact, or matter in issue, directly based upon or necessarily involved in a determination, redetermination, decision of the appeals examiner or decision of the commission which has become final, shall be conclusive for all the purposes of this chapter as between the interested parties who had notice of such determination, redetermination, or decision. *Subject to appeal proceedings and judicial review by the Supreme Court as set forth in this section, any determination, redetermination or decision as to rights to benefits shall be conclusive for all purposes of this chapter and shall not be subject to collateral attack irrespective of notice*." IDAHO CODE § 72-1368(11)(a) (emphasis added).

submitted the testimony of Mr. Lopez, who stated that Complainant repeated at least fifteen times, "You fire me. Come on. Fire me." Therefore, according to Eltzroth, because Respondent has "produced evidence in an attempt to show that Complainant was terminated for a legitimate, nondiscriminatory reason," the undersigned will now analyze whether Complainant has prevailed by a preponderance of the evidence on the ultimate question of liability.

### 1. Protected Activity

To prevail on the ultimate issue of liability, Complainant must first prove by a preponderance of the evidence that he engaged in a protected activity under the ERA. A complaint or charge of employer retaliation because of safety and quality control activities is protected activity under the ERA. McCuistion v. Tennessee Valley Auth., 89-ERA-6 (Sec'y Nov. 13, 1991). In addition, it is protected conduct for an employee to file internal quality control reports and to make internal complaints regarding safety or quality problems. Bassett v. Niagra Mohawk Power Co., 85-ERA-34 (Sec'y Sept. 28, 1993).

In the present case, Complainant contends that he engaged in protected activity when he raised his concerns that Mr. Lopez had violated NRC regulations when taking the sampling, and that the samples themselves were not taken in accordance with NRC regulations. Complainant testified that he recorded these violations on a page in Scientech's daily log; however, according to Complainant, that particular page is currently missing from the log. Complainant then raised the same safety concerns with Mr. Stockwell because Complainant believed that the work plan directed him to do so. In addition, Complainant testified that he also raised his safety concerns with Mr. Lopez when he was approached by Mr. Lopez on October 1, 1998.

The undersigned finds the above evidence presented by Complainant to be very credible. During the hearing, the undersigned had the unique advantage of having heard the testimony firsthand, and thus has observed the behavior, bearing, manner and appearance of witnesses from which impressions were garnered of the demeanor of those testifying which also forms part of the record evidence. The undersigned found Complainant to be both genuine and truthful about the events surrounding his termination, and thus credits his testimony that he in fact raised safety concerns with both Mr. Stockwell and Mr. Lopez, and noted the violations in the safety log. Furthermore, Mr. Lopez admitted that Complainant had indeed raised concerns that NRC regulations were violated by his sampling. Mr. Lopez also admitted that he was told by Mr. Stockwell that Complainant had concerns regarding the quality of the samples. Accordingly, I find that the Claimant has established by a preponderance of the evidence that he engaged in protected activity.

Respondent argues that Complainant was not motivated to raise these complaints because of any safety concern, but rather was motivated by his dislike for Mr. Lopez, and thus did not engage in protected activity. The undersigned disagrees with Respondent and finds that Complainant did not report the NRC violations because of any animosity he felt towards Mr. Lopez. Complainant's co-worker, Lea Reed, testified that Complainant was genuinely upset over the safety violations and felt that he needed to voice his concerns. Complainant himself testified that he reported the violations because the work plan directed, and federal law required, him to do so. However, even assuming that any animosity existed between Complainant and Mr. Lopez, the Secretary of Labor has held that merely because a complainant is motivated in part by a desire to

retaliate against a co-worker, the expression of a safety or health concern is not removed from categorization as a protected activity. Nathaniel v. Westinghouse Hanford Co., 91-SWD-2 (Sec'y Feb. 1, 1995).

### 2. Adverse Action by Respondent

Once Complainant has proven that he engaged in a protected activity, he then must prove by a preponderance of the evidence that Respondent took adverse action against him. Scientech's termination of Complainant's employment at Norton AFB on October 1, 1998 was clearly an adverse action against Complainant.

### 3. Complainant's ERA Protected Activity was a Contributing Factor in the Adverse Action taken by Respondent

Although Complainant has established that he engaged in protected activity and that Respondent took adverse action against him, he must also demonstrate by a preponderance that retaliation for his protected activity was a contributing factor in the decision to terminate him. According to Secretary of Labor, "[o]ne way for a complainant to establish that his protected activities were a contributing factor to the adverse employment action is to show that the reason the respondent gave for taking the action was pretextual." Creekmore v. ABB Power Systems Energy Services, Inc., 93-ERA-24 (Sec'y Feb. 14, 1996), slip op. at 4.

#### a. Insubordination

In the present case, Respondent contends that it fired Complainant because of his insubordination and belligerence towards Mr. Lopez, and thus terminated Complainant for a legitimate, nondiscriminatory reason. In Durham v. Brock, 794 F.2d 1037 (5th Cir. 1986), the Court of Appeals held that even though an employee has engaged in protected activity under the employee protection provisions of the ERA "[a]busive and profane language coupled with defiant conduct or demeanor justify an employee's discharge on the grounds of insubordination." *Id.* at 1041.

At the hearing, Respondent presented the testimony of Mr. Lopez, who testified about a series of alleged confrontations he had with Complainant at Norton AFB. Mr. Lopez explained that he argued with Complainant regarding the purchase of office supplies, proper training procedures, use of a company truck, an incident which occurred at the hotel where Scientech employees were residing during the project, and Complainant's refusal to obey instructions which directed employees to stay out of a particular area on the base. Mr. Lopez testified that the last confrontation he had with Complainant concerned the sampling of the drums by Mr. Lopez. During this final confrontation, Mr. Lopez explained that Complainant began yelling at him, and while Mr. Lopez was trying to back away from the situation, Complainant yelled in a loud voice, "Fire me. Come on. Fire me." Mr. Lopez also testified that he had given Complainant warnings regarding his behavior. Certainly, if Mr. Lopez is believable with reference to this matter, Complainant was insubordinate and appropriately discharged. However, I don't find him credible.

Complainant, however, maintains that he was neither belligerent nor insubordinate towards Mr. Lopez. As noted previously, the undersigned found Complainant to be very credible during his testimony at the hearing. Complainant explained that both he and Mr. Lopez had raised their voices during the final confrontation over the sampling Mr. Lopez had taken. Complainant denied that he and Mr. Lopez had ever argued over the purchasing of office supplies, the use of a company truck, or his entry into an unauthorized area on the base, and denied that he ever threatened Mr. Lopez regarding the hotel incident. Complainant also denied receiving any verbal or written warnings from Mr. Lopez during the course of his employment. It is worth noting that on cross-examination, Mr. Lopez recognized that there were several inconsistencies in the dates that he allegedly gave Complainant these warnings, which further supports Complainant's assertion that he never received such warnings.

Complainant's testimony regarding his behavior was corroborated by the testimony of Lea Read, who stated that she never saw Complainant act belligerent or abusive towards Mr. Lopez. Furthermore, Mark Sassar testified that Complainant was "the quietest, calmest person" he had ever met, and that he would not have characterized Complainant's behavior as insubordinate. Complainant's testimony that he was not belligerent was also corroborated by Respondent's own witness, Mark Stockwell, who testified that he also could not characterize Complainant's behavior as insubordinate, but rather that the verbal tactics he used were inappropriate.

Consequently, the undersigned finds that Complainant's behavior certainly did not rise to the level of insubordination or abuse necessary to no longer receive whistleblower protection under the ERA. Although it may have been inappropriate for Complainant to raise his voice at Mr. Lopez during the final confrontation over the improper sampling, the undersigned finds that any alleged misconduct was "'nothing more than the result and manifestation of [his] protected activity,' which does not remove [Complainant] from statutory protection." McDonald v. University of Missouri, 90-ERA-59 (Sec'y Mar. 21, 1995), slip op. at 8-9 (citing Sprague v. American Nuclear Resources, Inc., 92-ERA-37 (Sec'y Dec.1, 1994)).

The undersigned also finds that Complainant was not insubordinate when he brought his safety concerns to Mr. Stockwell, rather than his direct supervisor, Mr. Lopez. Complainant's decision to raise his safety concerns to Mr. Stockwell rather than Mr. Lopez, while impolitic and potentially harmful to his working relationship to Mr. Lopez, was correct according to the Health and Safety Plan issued to Complainant before he began working at Norton AFB:

> "Conditions or situations that are unsafe must be reported immediately to the Versar Project Manager or the Site Manager. Work will not be continued until unsafe conditions or situations are resolved. Employees need fear no repercussions for refusing to engage in unsafe work practices." CX 25 (Health & Safety Plan, page 2 of 31).

Thus, based on the directives in the work plan quoted above, Complainant was not insubordinate when he raised his safety concerns with Mr. Stockwell, who was the Site Manager, rather than Mr. Lopez.

Therefore, based on the above described evidence, the undersigned finds that there is no merit to Respondent's argument that it fired Complainant because he was insubordinate, and thus Respondent did not terminate Complainant for a legitimate, nondiscriminatory reason.

### b. Complainant's "Request" to be Fired

In pre- and post-hearing briefs, Respondent argued that Complainant was fired because he "requested" his own termination when he repeatedly told Mr. Lopez, "Fire me. Fire me. Fire me." Consequently, Respondent contends that Complainant's request constitutes an intervening cause that prevents him from proving a retaliatory discharge.

However, the undersigned does not agree with Respondent that Complainant actually "requested" that he be fired. According to Complainant, whom the undersigned finds credible, Mr. Lopez told Complainant that Mr. Bradford was going to be arriving at Norton AFB on Monday and that "he'll [Mr. Bradford] take care of you and this problem." In response, Complainant testified that he raised his voice and said, "Steve, is Mr. Bradford going to come down and fire me? Why don't *you* do it? Why don't *you* fire me?" (emphasis added).

It appears that Complainant's response was not a demand that he be fired, but rather an inquiry as to whether Mr. Bradford was going to fire him, and if so, why didn't Mr. Lopez simply terminate Complainant himself. While this behavior may have been inappropriate, the Secretary of Labor has recognized that when employees engage in protective activity, they can exhibit impulsive behavior. Sprague v. American Nuclear Resources, Inc., 92-ERA-37 (Sec'y Dec. 1, 1994), slip op. at 5. Consequently, the Secretary has found that such employees may not be disciplined for insubordination as long as their behavior is lawful and their conduct is not indefensible in its context. *Id*. Therefore, the undersigned finds that Respondent's argument that Complainant requested his own termination, and thus relieves Respondent of liability under the ERA, is without merit, and was therefore neither a legitimate nor nondiscriminatory reason for terminating Complainant's employment.

### c. Change of Position

When Respondent filed its answer to Complainant's complaint, it alleged that Complainant "was terminated solely and exclusively for insubordination and misconduct in the course and scope of his employment in failing to follow the proper chain of command and procedures established by the [Respondent]." Resp. Answer at 5 (presented as Complainant's Exhibit 6). In addition, Scientech manager Michael Gauss admitted during cross-examination that Respondent's first official response to Complainant's firing was that Complainant, "by acting outside the normal and accepted chain of protocol, . . . put the company's customer Versar in an uncomfortable position and therefore adversely affected company/client relationships." TR 320.

Complainant alleges that Respondent changed its position on the reason for Complainant's termination after learning that an employee may not be disciplined for failing to observe an established chain of command when making safety complaints. Fabricius v. Town of Braintree/Part Dept., 1997-CAA-14 (ARB Feb. 9,

1999). Consequently, Complainant argues that this shift in Respondent's theory indicates that the new theories (insubordination and Complainant's request to be fired) are pre-textual. *See* Hoffman v. Bossert, 94-CAA-4 (Sec'y Sept. 19, 1995) (finding that "[a] respondent's shifting explanations about the reason for taking an adverse action often reveal that the real motive was unlawful retaliation").

The undersigned agrees with Complainant and finds that the change in Respondent's theory for Complainant's termination is very relevant. Such evidence strongly indicates to the undersigned that the reasons Respondent currently alleges for terminating Complainant are pre-textual and should not be believed, and bolsters the previous determinations that Respondent's arguments are without merit.

In sum, based upon the above determinations that the reasons put forth by Respondent for terminating Complainant were pre-textual, the undersigned finds that Complainant has prevailed on the ultimate question of liability after proving, by a preponderance of the evidence, that his protected activity was a contributing factor in Respondent's decision to terminate his employment.

## III. DAMAGES

In the event that a respondent is found to have violated the ERA, "the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment. . . ." 42 U.S.C. § 5851(b)(2)(B). In addition, "the Secretary may order such person to provide compensatory damages to the complainant." *Id*. Finally, the Secretary shall assess costs and expenses, including attorney's fees, reasonably incurred in bringing the complaint. *Id*.

### A. Calculation of Complainant's Back Pay Award

The purpose of a back pay award is to make the employee whole, that is to restore the employee to the same position he would have been if not discriminated against. Blackburn v. Metric Constructors, Inc., 86-ERA-4 (Sec'y Oct. 30, 1991). Thus, an award of back pay runs from the date of termination until the date that the complainant was able to find suitable alternative employment, but such amount must be offset by any amount earned in a replacement job. Blake v. Hatfield Electric Co., 87-ERA-4 (Sec'y Jan. 22, 1992) (instructing the ALJ to calculate back-pay award in accordance with the Secretary's decision in Johnson v. Old Dominion Security, 86-CAA-3, 4, and 5 (Sec'y May 29, 1991)). A complainant has the burden of establishing the amount of back pay that a respondent owes. Pillow v. Bechtel Construction, Inc., 87-ERA-35 (Sec'y July 19, 1993). In addition, back pay liability ends when the discriminatee would have been laid off absent any discrimination. Blake, *supra*.

In the present case, Complainant was discharged on October 1, 1998, and remained unemployed for a period of seven weeks until he obtained employment with another employer on November 23, 1998. While Complainant worked for Respondent, he was paid $25.00 per hour. Complainant's Proposed Findings at 30. Thus, based on a work week of 40 hours, Complainant incurred a loss of $1,000.00 per week, and is therefore entitled to back pay in the amount of $7,000.00 (7 weeks unemployed × $1,000.00 per week). In addition, Complainant is entitled to interest on the $7,000.00 back-pay award at the rate provided for in 26 U.S.C. § 6621. Van Beck v. Daniel Construction Co., 86-ERA-26 (Sec'y Aug. 3, 1993).

## B. Attorney's Fees and Costs

Pursuant to the statues enumerated herein and the applicable regulations thereunder, Complainant is entitled to payment of costs and expenses, including attorneys' fees, reasonably incurred in bringing this complaint.

## ORDER

1. Respondent shall pay Complainant back pay in the amount of $7,000.00.

2. Consistent with this Recommended Decision and Order, Respondent shall pay Complainant interest on the amount due at the rate specified in 26 U.S.C. § 6621 (1988).

3. Respondent shall expunge Complainant's employment records of any reference to the exercise of his rights under Section 211 of the Energy Reorganization Act of 1974, as amended, related to this matter.

4. Respondent shall remove from Complainant's employment records his letter of termination dated October 1998. Respondent's records shall reflect that Complainant resigned from his position effective October 1, 1998.

5. Respondent shall provide a neutral reference, to include dates of employment, job title, and final wage rate, to all potential employers regarding the Complainant.

6. Respondent shall not retaliate or discriminate against Complainant in any manner for instituting or causing to be instituted any proceeding under or related to the aforementioned statutes.

7. (A) Counsel for Complainant shall file a Petition for Fees and Costs within 30 days after filing the Recommended Decision and Order for all legal services rendered with service on Counsel for Respondent. Any claim for prior fees and costs incurred to another law firm must be submitted in the same format as indicated herein. Such submissions shall be on a line-item basis and shall separately itemize the time billed for each service rendered and costs incurred. Each such item shall be separately numbered.

   (B) Respondent may file objections, if any, to said applications for fees and costs, within 15 days of receipt, but all objections to said Counsel's petition shall be on a line-item basis using Counsel for Complainant's numbering system, and any item not objected to in such manner and within such time shall be deemed acquiesced in by Respondent.

   (C) Within 10 days after receipt of any such objections from Respondent, Counsel for Complainant may file a response thereto. Such submissions shall be in the form of a line-item response. Any objections not responded to in such manner and within such time will be deemed acquiesced in by Counsel for Complainant.

**HENRY B. LASKY**
**Administrative Law Judge**

Dated:
San Francisco, California
HBL:kw

**NOTICE:** This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Such petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).